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SUPREME COURT, U. S.

No. 75-480

In the
Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL EDUCATIONAL ADVERTISING SERVICES, INC.,
Petitioner,

vs.

CASS STUDENT ADVERTISING, INC.,
Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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The Scheffer Press, Inc.—(312) 263-6850

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Respondent's brief, treating this small antitrust case as unworthy of Supreme Court review, overlooks the fact that it was the respondent who initially overrated the case by seeking antitrust remedies for alleged monopolization of the business of "representing college newspapers . . . in the placement of national advertising". The District Court, realizing from the evidence that this very small service occupation did not amount to a market of economic or antitrust significance, dismissed the case. On respondent's appeal, the Court of Appeals has overly magnified the case by portraying this minor service as part of an elaborate framework of economic theory resulting in the finding of a relevant market by the court of review. Yet this finding is not based on the

evidence or trial court findings, but on serious errors of fact and law. More importantly, the Court of Appeals' theory would make a monopolist of thousands of sales representatives in the vast field of distribution of goods, wares, and merchandise and would permit many minor commercial disputes to be converted into federal anti-trust claims. Review by this Court, halting this error and the resulting confusion in its incipiency, is clearly within the standards for review stated in this Court's Rule 19(b).

The Court of Appeals' holding as matter of law that the solicitation of national advertising for college newspapers is not a readily interchangeable service (the controlling criterion for a relevant market under all the decisions) is unsound on its face. Anyone with an elementary understanding of college newspapers and national advertising can solicit one for the other. Neither capital, a patent, special expertness nor much organization is required. The concept of interchangeability is misunderstood by the Court of Appeals when it says that college newspapers cannot practically "assume" the solicitation of national advertisers themselves and have "little alternative" to respondent or petitioner in obtaining national advertising since other advertising representatives specialize by medium. This statement of the Court of Appeals is emphasized by respondent (p. 2) as the Court's "key finding" (as if it were a factual determination). The controlling consideration is not what has been or is being interchanged but the possibility of interchanging. That is the meaning of the suffix "-able" in the word "interchangeable." Treating the relevant market as solely a question of law, the Court of Appeals' holding should be reviewed and reversed.

But the Court of Appeals was also wrong in not holding that the District Court's relevant market determination, most concisely stated in several sentences quoted in a footnote[1], was a finding of fact that could not be reversed without demonstrating it to be clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. The District Court's factual conclusion was that economic and commercial realities do not support respondent-plaintiff's contention that the respondent and petitioner are specialized vendors or that the solicitation of national advertising for college newspapers is a separate market. Here the District Court, after hearing testimony of witnesses and much documentary evidence, drew factual inferences which, unless clearly erroneous, the Court of Appeals could not overturn. Respondent, though claiming repeatedly that the facts were uncontroverted, disputes (Brief, p. 4 n.) the testimony of a defense witness on the question of interchangeability. However, the most

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[1] "Thus, it can reasonably be concluded that, *from the viewpoint of the industries involved*, the national advertisers and the school papers, plaintiff's alleged market is not a relevant market or submarket.

"No evidence was presented to differentiate the parties' business from those enterprises which attempt to sell advertising space in other purlications or media. On the contrary, testimony for the defense by an employee of a commercial newspaper representative *established that the functions performed by advertising representatives for commercial daily newspapers are 'interchangeable' with the operations of representatives for other media.* And Mr. Hanson stated that he was 'doing the same thing selling space in college newspapers as [he] was [when he was working] on the Ladies' Home Journal' as an advertising salesman. Thus, neither CASS nor NEAs can be deemed a 'specialized vendor,' *Brown Shoe Co.* v. *U.S., supra*, performing peculiar functions." (Pet. for Cert. pp. 10b-11b, emphasis added).

significant fact findings were factual inferences from evidence which are within the function of the finder of fact and not of the court of review[2], even though the facts are undisputed. The Court of Appeals, in the guise of legal analysis, has invaded the province of the District Court contrary to the mandate of Rule 52(a). As a precedent this holding would tend to increase the scope of antitrust coverage as a matter of law over much comparatively insignificant economic activity.

The respondent's brief does not undertake to defend the analysis in the Court of Appeals' opinion that apparently attempts to apply the terminology of theoretical economics to the solicitation of national advertising for college newspapers. We quote excerpts from the opinion (Pet. for Cert. pp. 11a-13a):

> "*. . . the college newspapers are 'buyers' or consumers of Cass' and NEAS' services.*
>
> "NEAS and Cass are classic 'middlemen,' providing services to both the sellers (the college newspapers) and to the buyers (the national advertisers) by representing each seller's wares (an ability to reach a discrete portion of the college market with advertisements) to the buyers. As the district court opinion notes, neither individual buyers nor individual sellers in this market would likely be financially able to

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[1] (Continued)

". . . Economic and commercial realities do not support the conclusion that the market for representing college newspapers for the placement of national advertising is a 'separate identifiable market,' *International Boxing Club* v. *United States, supra* at 250, or submarket." (*Id.* 14b)

[2] In a pioneer Supreme Court case on Rule 52(a), this Court explained that the rule applies to "inferences drawn from documents or undisputed facts", *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394 (1948). See later cases cited in 9 Wright and Miller, Federal Practice and Procedure, 747 n. 35 (1971).

seek the other out, absent the services of a middleman. Thus a middleman in this market can have an economically feasible business because it represents numerous sellers to numerous buyers. . . .

"In the context of a 'middleman market' such as we have here, however, it may not be easy for a court to choose one of the 'end' parties as the sole purchaser of the middleman's services. In this case, the national advertiser is the 'ultimate purchaser', that is, it buys page space from the college newspaper. This does not, however, directly control the determination of who is the purchaser of the middleman's services. . . . In such a case, the ultimate purchaser, even though he buys through the solicitor, is clearly not the purchaser of the solicitor's services.

"It is conceivable that both end parties in a middleman market could be purchasers of the middleman's services. In such cases, two relevant market determinations might be necessary."

Here the Court of Appeals, treating petitioner and respondent not as agents of the college newspapers they represent but as "middlemen", uses terms that could be applied to a very large group of sales representatives who distribute many kinds of commodities. This opinion would provide a framework of theoretical labels that could be used superficially to make a relevant market out of activity that, as a market or submarket, has little significance in economic fact and should have no antitrust significance. Further, while the Court of Appeals emphasizes the role of the middleman, the two components in the alleged relevant market are the college newspapers employing newspaper advertising representatives, and the national advertisers solicited by newspaper advertising representatives. No college newspaper or national advertiser is a party to this action and there is no evidence that they have been injured by the petitioner. The analysis by the Court of Appeals provides this Court with a justifiable reason for review.

CONCLUSION

This case, despite the slight proportions repeatedly emphasized by respondent, has acquired an important significance because the Court of Appeals' holding and opinion make an antitrust mountain out of a commercial molehill. The potential for much groundless federal litigation thereby created should be removed by this Court's exercise of its reviewing power.

Respectfully submitted,

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